

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 22 OF 2005

Shri Barkat Ali,
S/o Shaik Yassim,
Major, bachelor,
R/o near Kirti Hotel,
Silva Nagar, Ponda-Goa.

... Applicant

versus

1. Shri Ramkrishna S. Naik
S/o Shankar Naik,
Major of age, married,
Advocate, r/o Tisk,
Ponda, Goa.

2. State of Goa
Through the Public Prosecutor.

... Respondents

Mr. Arun Bras de Sa, Advocate for the Applicant.

Mr. S. D. Lotlikar, Senior Advocate with Mr. M. D'Souza,
Advocate for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 2ND MARCH, 2006.

ORDER

The applicant herein is the Accused who has been convicted and sentenced under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short) by the learned J.M.F.C., Ponda and whose conviction and sentence has been maintained in Criminal Appeal No.44/2005 filed by the Accused.

2. In this revision, the Accused questions the legality of the said conviction and sentence.

3. The case of the Complainant was that the Accused had issued a cheque to the Complainant drawn on Saraswat Co-operative Bank Limited, Ponda, dated 2-8-2003 for Rs.2,90,000/- and when the Complainant deposited the said cheque with Goa Urban Co-operative Bank Limited, Ponda, the same was returned unpaid with a remark that the funds were insufficient by memo dated 4-8-2003 and, therefore, the Complainant issued a notice dated 6-8-2003 calling upon the Accused to pay to him the said sum of Rs.2,90,000/- within fifteen days, which notice the Accused received on 13-8-2003 but failed to comply with the same.

4. The Complainant, therefore, filed the complaint.
5. The case of the Accused was that the said cheque was issued as Rafiq Raja Khalifa was to transfer his plot and house in his name and that he had issued instructions to the Bank not to honour the cheque as the said plot and house were not transferred in his name.
6. The Complainant examined himself and produced an agreement dated 25-11-2003 between the Complainant, as first party, Rafiq Raja Khalifa as second party, and the Accused as third party.
7. There is no dispute that the Complainant herein had earlier filed a criminal complaint bearing no.256/08/03/D prosecuting Rafiq Raja Khalifa for an offence under Section 138 of the Act and as stated by the Complainant, regarding which there is no dispute, the cheque issued to the Complainant by the present Accused was issued after the said criminal complaint was withdrawn by the Complainant filed against the said Rafiq Raja Khalifa. There is also no dispute that earlier the Complainant had advanced a sum of Rs.2,90,000/- to the said Rafiq Raja Khalifa on interest at the rate of 3%.

8. In the above background, learned Counsel Mr. Bras De Sa has submitted that the Complainant was a lawyer by profession and, therefore, could not have given a loan without a licence as required under the Goa Money Lenders Act, 2001. Learned Counsel has referred to Section 2(K) of Money Lenders Act which defines the expression loan and to Clause (XII) of Section 2(K) and submitted that advancing money is not in the regular course of business of a lawyer. Learned Counsel has submitted that a loan given without licence would not be recoverable by filing a suit and, therefore, there was no legally enforceable liability against the Accused. In support of this submission, Mr. Bras De Sa has placed reliance on the case of **M/s Krishnam Raju Finances, Hyderabad v. Abida Sultana and another**(2004 ALL MR Cri.(Journal) 131) wherein it was held that once the transaction was found to be illegal under Section 138 A.P.(Telangana Area) Money Lenders Act it cannot be made legal for the purpose of any other Act.

9. On the other hand, Mr. S. D. Lotlikar, the learned Senior Counsel on behalf of the Complainant has been quick to point out, and in my view rightly, that the Complaint was not for the loan advanced to the said Rafiq Raja Khalifa but to enforce the liability of the present Accused who had taken over the same from the said Rafiq Raja Khalifa pursuant to

the agreement dated 25-11-2003. In this view of the matter, the submission of learned Counsel Mr. Bras De Sa does not require any further consideration in detail and, therefore, has got to be rejected.

10. Mr. Bras De Sa, the learned Counsel on behalf of the applicant/accused has further submitted that the Accused was unable to honour the cheque issued by the Accused pursuant to the said agreement because Condition 5 of the said agreement was not performed by the said Rafiq Raja Khalifa and the agreement was dependent upon the performance of the said Clause No.5, which reads as follows:-

"5. That the Second Party(Rafiq Raja Khalifa) shall enter into an agreement with the Third Party (Barkat Ali) for sale of his residential house along with plot at Durgabhat, as security towards his liability taken over by the Third Party(Barkat Ali)".

11. Mr. Bras De Sa submits that it was for the Complainant to have proved that such an agreement was entered into and the said Rafiq Raja Khalifa had performed his part of the agreement. In my view this submission also deserves to be rejected. Admittedly, the agreement dated 25-11-2003 was a tripartite agreement and by virtue of the said Clause 5 of the

agreement the second party(Rafiq Raja Khalifa) was to enter into an agreement with the third party(Barkat Ali) for sale of his residential house along with a plot at Durgabhat. There is no reference in the entire agreement that Clause 5 was a precondition upon which the present Accused had taken over the liability of the Complainant. Clause 5 was nothing more than an interse agreement between Rafiq Raja Khalifa and the Accused and in case for any reason whatsoever the said part of the agreement has not been performed by the said Khalifa it is for the Accused to proceed against the said Khalifa and this is irrespective of the liability which the Accused took over from the said Rafiq Raja Khalifa towards the Complainant. The second submission also deserves to be rejected.

12. The third submission of the learned Counsel Mr. Bras De Sa is that the Complainant did not set out in the Complaint about the filing of the said complaint namely, 256/08/03/D, its withdrawal and then entering into the said agreement dated 25-11-2003 and on that count this complaint ought to have been dismissed. In support of this submission, Mr. Bras De Sa has placed reliance on the case of **Kishore Shankar Singapurkar v. State of Maharashtra and another**(2003 All MR(Cri) 1867). I have perused the said decision. In my view, all that the Complainant was required to set out in a complaint are the facts which constitute the offence or offences alleged. At

the most, the Complainant may be required to set out a motive, if any, for the alleged commission of offence/s. In my view, the Complainant is certainly not required to set out in his complaint any facts than those which are necessary to constitute an offence/s and/or the motive for the same. It is thereafter for the Accused to bring out facts in the cross-examination to prove that the Complaint is not maintainable for one reason or the other. In this view of the matter, the third submission also deserves to be rejected.

13. In my view, there is no merit in this revision. The Accused was rightly convicted and sentenced, which conviction and sentence has been upheld by the appellate Court. Consequently this revision is hereby dismissed.

N. A. BRITTO, J.

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